TENGKU ISMAIL TENGKU SULAIMAN & ORS A

v.

SIA CHENG SOON & ANOR

COURT OF APPEAL, PUTRAJAYA B
DENIS ONG JCA
HASHIM YUSOF JCA
ZALEHA ZAHARI JCA
[CIVIL APPEAL NO: N-04-188-04]
26 JUNE 2006 C

CIVIL PROCEDURE: *Pleadings - Limitation - Whether must be specifically pleaded by defendants before completion of full trial - Whether defendants could still rely on defence of limitation if not pleaded beforehand - Rules of natural justice - Civil Law Act 1956, s. 7(5)* D

LIMITATION: *Pleading - Defence of limitation - Whether must be specifically pleaded by defendants before completion of full trial - Whether defendants could still rely on defence of limitation if not pleaded beforehand - Rules of natural justice - Civil Law Act 1956, s. 7(5)* E

This case arose from an accident involving two motor vehicles; more than four years after the date of the accident, the appellants/plaintiffs filed the action which was the subject matter of this appeal pursuant to s. 7 of the Civil Law Act 1956 ('the Act'). The respondents/defendants, in filing their statement of F defence, did not raise the issue of limitation. The case had proceeded to full trial before the Sessions Court, at the conclusion of which the Sessions Court judge directed that written submissions be filed. The defendants only then, in their written submissions, raised the issue of limitation for the first time, G contending that the plaintiffs' claim was time-barred as it was filed out of the time frame prescribed by s. 7(5) of the Act. The Sessions Court judge, on the issue of limitation, found that the parties were bound by their pleadings and subsequently entered judgment for the plaintiffs. On appeal, the High Court judge H reversed the decision, holding that by reason of the Act having its own limitation period as provided in s. 7(5) and by reason of the Limitation Act 1953 ('LA') being inapplicable to this case, s. 7(5) was an absolute provision which has to be applied under all circumstances and that any person mindful of instituting any I proceedings under s. 7 must do so within three years of the death of the person deceased. His Lordship also took into consideration

A the absence of a *pari materia* provision in the Act in terms of s. 4 of the LA and held that, in the absence of such a provision, it was not necessary for the defendants to plead limitation as a defence. The plaintiffs appealed. The sole issue in this appeal was whether it was open to the defendants, in the circumstances of
B the present case, to raise the plea that the claim of the plaintiffs was time-barred pursuant to s. 7(5) of the Act.

Held (allowing the appeal)
Per Zaleha Zahari JCA:

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(1) A plea of limitation raised at the submissions stage after the court has gone through the whole process of full trial clearly no longer serves its purpose as a procedural bar when the case can, if the plea was raised at an earlier date, be struck out based on a technical defence. By reason of the
D defendants' failure to plead the issue of limitation, the plaintiffs clearly had been lulled into a sense of security that the case would be met on the merits. If it were still open for a defendant to raise limitation at such a late stage, there would clearly have been precious judicial time wasted. In the
E circumstances of the present case, limitation was raised at a stage when the evidence at trial indicated 100% liability on the defendants' part. To permit the defendants to raise limitation would effectively be giving the defendants an opportunity to renew the fight on an entirely different defence. (para 17)

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(2) The omission in this case to plead limitation could have been either inadvertent or deliberate. Whatever the real reason may have been, the object of pleadings of not taking the opposite party by surprise as a matter of natural justice – as provided
G by O. 14 r. 14(1) of the Subordinate Courts Rules 1980 and O. 18 r. 8(1) of the Rules of the High Court 1980 – must be observed. A defence by "ambush" clearly should not and cannot be permitted to continue to form part of procedural law when it results in injustice to a litigant. A defendant who
H fails to plead a defence of limitation and allowed a case to proceed to be fought on the merits is not to be permitted to fall back upon a plea of limitation as a second line of defence at the conclusion of the trial. (para 22)

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Bahasa Malaysia *translation of headnotes*

Kes di sini berbangkit dari satu kemalangan yang melibatkan dua kenderaan bermotor; selepas lebih empat tahun dari tarikh kemalangan, perayu/plaintif telah memfail tindakan di bawah s. 7 Akta Undang-Undang Sivil 1956 ('Akta'), iaitu tindakan yang menjadi halperkara rayuan di sini. Responden/defendan, dalam memfail pembelaan mereka, tidak memplidkan isu hadmasa. Kes didengar sepenuhnya oleh Mahkamah Sesyen dimana, di akhir perbicaraan, hakim Mahkamah Sesyen mengarahkan supaya hujahan bertulis difailkan. Pada hujahan bertulisnya, defendan, buat pertama kalinya, telah membangkitkan isu hadmasa, sekaligus menghujahkan bahawa tuntutan plaintif telah difail luar hadmasa dan melanggar peruntukan s. 7(5) Akta. Berkaitan isu hadmasa ini, hakim Mahkamah Sesyen memutuskan bahawa pihak-pihak adalah terikat dengan pliding mereka dan dengan itu memberikan penghakiman kepada plaintif. Keputusan tersebut, bagaimanapun, telah diakas oleh hakim Mahkamah Tinggi semasa rayuan atas alasan bahawa, oleh kerana Akta mempunyai tempoh hadmasanya sendiri melalui s. 7(5) dan Akta Hadmasa 1953 ('LA') tidak terpakai kepada kes di sini, maka s. 7(5) adalah satu peruntukan mutlak yang mesti dipakai kepada semua keadaan, dan selanjutnya bahawa, sesiapa yang berhasrat untuk memulakan prosiding di bawah s. 7 hendaklah berbuat demikian dalam masa tiga tahun selepas kematian si mati. Yang arif hakim juga mengambilkira ketiadaan peruntukan pari materia di dalam Akta dalam konteks s. 4 LA dan memutuskan bahawa, dalam ketiadaan peruntukan sedemikian, adalah tidak perlu bagi defendan untuk memplidkan hadmasa sebagai satu pembelaan. Plaintif merayu. Persoalan tunggal yang berbangkit adalah sama ada, dalam halkeadaan kes di sini, ianya terbuka kepada defendan untuk berhujah bahawa tuntutan plaintif telah dihalang oleh hadmasa di bawah s. 7(5) Akta.

Diputuskan (membenarkan rayuan)
Oleh Zaleha Zahari HMR:

(1) Hujah hadmasa yang dibangkit di peringkat penghujahan selepas mahkamah telah selesai melalui keseluruhan proses perbicaraan jelas tidak boleh bertindak sebagai suatu halangan prosedur, walaupun kes mungkin boleh dibatalkan atas alasan teknikal pembelaan jika ianya dibangkit lebih awal dari itu. Disebabkan kegagalan defendan membangkitkan isu hadmasa, plaintif telah dikaburkan dengan keyakinan bahawa kesnya akan

dijawab di atas merit. Tentunya, banyak masa bernilai kehakiman akan tersia jika ianya masih terbuka kepada defendan untuk membangkitkan isu hadmasa walaupun pada peringkat yang selewat itu. Hadmasa juga telah dibangkitkan sewaktu keterangan dalam perbicaraan menunjukkan defendan menanggung 100% liabiliti. Maka itu, membenarkan defendan membangkitkan hadmasa bererti memberi peluang kepada defendan untuk meneruskan kesnya walaupun atas pembelaaan yang berbeza.

(2) Kegagalan membangkitkan hadmasa di sini mungkin disengajakan dan mungkin juga disebabkan kecuaian. Apapun sebabnya, objek pliding untuk tidak membuat kejutan kepada pihak lawan sebagai perkara keadilan semulajadi – sepertimana yang diperuntukkan oleh A. 14 k. 14(1) Kaedah-Kaedah Mahkamah Rendah 1980 dan A. 18 k. 8(1) Kaedah-Kaedah Mahkamah Tinggi 1980 – harus dipatuhi. Jelasnya, pembelaan secara "serang hendap" tidak boleh dibiarkan menjadi sebahagian undang-undang prosedur kerana ia menyebabkan ketidakadilan kepada litigan. Seorang defendan yang gagal untuk memplid pembelaan hadmasa dan membiarkan kes ditentangi di atas merit, tidak harus dibenarkan untuk kembali membangkitkan hujah hadmasa sebagai jalur pembelaan keduanya pada penutup perbicaraan.

Case(s) referred to:
Ketteman v. Hansel Properties [1987] AC 189 ***(refd)***
Kuan Hip Peng v. Yap Yin & Anor [1965] 31 MLJ 252 ***(dist)***
Lee Cheng Yee v. Tiu Soon Siang & Anor [2004] 1 CLJ 1 CA ***(not foll)***
Young v. Bristol Aeroplane Ltd [1944] 1 KB 718 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 7(5)
Limitation Act 1953, s. 4
Rules of the High Court 1980, O. 18 r. 8(1)
Subordinate Courts Rules 1980, O. 14 r. 14(1)

For the appellants/plaintiffs - Cyrus Das (AC Vohrah with him); M/s Vohrah & Tan Chee Lan
For the respondent - Cik Ratnavathy; M/s Mathew Thomas & Co

[Appeal from High Court, Seremban; Civil Appeal No: 12-44-2000]

Reported by Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] The sole issue in this appeal is whether it was open to the defendants (respondents before us), in the circumstances of the present case, to raise the plea that the claim of the plaintiffs (appellants before us) was time-barred pursuant to s. 7(5) of the Civil Law Act 1956 (the Act).

[2] This case arose from an accident on 11 December 1993 involving motor van No. JCH 3146 and motor lorry No. JCC 5590. More than four years after the date of the accident, ie, on 6 December 1997, the plaintiffs filed the action which is the subject matter of this appeal pursuant to s. 7 of the Act. The defendants filed their statement of defence on 27 February 1998. Limitation was not raised as an issue in the defence filed.

[3] The case had proceeded to full trial before the Sessions Court on 31 May 2000 at the conclusion of which the Sessions Court Judge directed that written submissions be filed. In their written submissions the defendants' counsel raised the issue of limitation for the first time; that the plaintiffs' claim was time barred as it was filed out of the time frame prescribed by s. 7(5) of the Act.

[4] On this issue of limitation the Sessions Court Judge held that parties were bound by their pleadings. She took the view that if the defendants had intended to rely on limitation as a defence, it must be pleaded pursuant to O. 14 r. 14(1) of the Subordinate Court Rules 1980. By reason of the defendants' failure do so she held that it was accordingly not open for them to rely on the same. The Sessions Court Judge then entered judgment for the plaintiffs.

[5] On appeal, the Sessions Court Judge's decision was reversed. The High Court Judge took a contrary view. The reasoning of the High Court Judge in making the decision that he did was as follows: By reason of the Act having its own period of limitation as provided in s. 7(5), and by reason of the Limitation Act 1953 being not applicable to this case, the High Court Judge held that s. 7(5) was an absolute provision which has to be applied under all circumstances; that any person mindful of instituting any proceedings under s. 7 must do so within three years after the death of the person deceased. His Lordship also

took into consideration the absence of a *pari materia* provision in terms of s. 4 of the Limitation Act 1953 in the Act. In the absence of such a provision in the Act, he held that it was not necessary for the defendants to plead limitation as a defence.

[6] Section 4 of the Limitation Act referred to by the High Court Judge reads as follows:

> Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

[7] The learned High Court Judge took the view that it is for the plaintiffs to take notice of the time frame prescribed by the Act and not for the defendant to plead it. He concluded that as the plaintiffs' action was instituted outside of the time frame prescribed by s. 7(5) it was *ultra vires* the Act. The defendant's appeal was then allowed but he made no order as to costs. Dissatisfied with the High Court Judge's order, the plaintiffs appealed.

[8] Pausing here for a moment, the doctrine of limitation is based on two broad considerations. Firstly, there is a presumption that a right that is not exercised for a long time is non-existent. The other is that, it is necessary that matters of right in general should not be left too long in a state of uncertainty or suspense. Limitation law is thus promulgated for the primary object of discouraging plaintiffs from sleeping on their actions, and more importantly, to have a definite end to litigation.

[9] Parliament has provided that a defendant, placed in the position such as the present, the opportunity to avoid the plaintiffs "stale" claim. Section 7(5) enables them to raise a procedural bar preventing the plaintiffs from pursuing the action against the defendants by reason of it being instituted outside of the time frame prescribed. The point taken here is that this technical defence was never pleaded. What accordingly is its effect and consequence?

[10] On the part of the defendants it was argued that this technical defence need not be pleaded. That it was quite in order for them to raise limitation as an issue even at such a late stage, when the trial has concluded.

[11] The defendants' counsel submitted that the High Court Judge was right in making the decision that he did. That it was not necessary for the defendants to plead limitation as s. 7(5) of the Act contains no exceptions and is absolute in nature and the requirement that it be pleaded does not arise. Limitation need only be pleaded in a situation where there are exceptions for the time frame prescribed to apply. It was incumbent upon the plaintiffs to file their action within a period of three years and that the defendant is entitled to the right conferred by s. 7(5). The decision of the Federal Court in *Kuan Hip Peng v. Yap Yin & Anor* [1965] 31 MLJ 252 and that of the Court of Appeal in *Lee Cheng Yee v. Tiu Soon Siang & Anor* [2004] 1 CLJ 1 were cited as authorities in support of these propositions.

[12] On the part of the plaintiffs it was argued that the object of pleadings was not to take the opposite side by surprise and to give full opportunity, as a matter of natural justice, to meet the opponent's case. This was not complied with in this case. Non-pleading of the limitation issue constitutes non-compliance of the rules as provided by O. 18 r. 8(1) Rules of High Court 1980 and 14(1) Subordinate Court Rules 1980 which expressly provides that a defence of limitation has to be expressly pleaded.

[13] The plaintiffs' counsel was of the view that the Federal Court decision in *Kuan Hip Peng* was not an authority on the requirement of pleading of the defence of limitation. He highlighted the fact that in *Kuan Hip Peng* the defendant had applied, (even before filing defence) to strike out the statement of claim on the basis of time-bar. Thomson LP, relying on certain English cases (not on s. 7(5) or its equivalent), borrowed the phrase 'absolute' to refer to limitation statutes that do not contain within it exceptions to the time-bar stipulated in them. He then described s. 7(5) as "absolute" because the Act does not contain exceptions to the time-bar in s. 7(5). There was a passing reference, by way of *dicta* (at p. 254-I), to the plaintiff's right to counter plead the exceptions where a defence of limitation is pleaded.

[14] The plaintiffs' counsel submitted that the Court of Appeal took it further when it decided as its *ratio* in *Lee Cheng Yee* that the defence of limitation need not be pleaded. The plaintiffs' counsel was of the view that the Court of Appeal went too far in extending the principle in *Kuan Hip Peng* in the case of *Lee Cheng Yee* to the pleading question, completely ignoring O. 14 r. 14(1)

A SCR and O. 18 r. 8(1) RHC which specifically requires any written law on limitation to be pleaded in the defence if it is intended to rely on it. As there was no consideration of the Rules (which have statutory force) in *Lee Cheng Yee*, he submitted that the decision of the Court of Appeal in this respect was
B accordingly *per incuriam*. He urged this court to depart from this decision. He then cited *Young v. Bristol Aeroplane Ltd.* [1944] 1 KB 718, as an illustration of a decision made *per incuriam*, where the court acted in ignorance of a statute or a rule. Lord Greene MR in *Young*'s case said:

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> ... but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a
> D decision of its own given when that provision was not present to its mind.

[15] The appellants' counsel had stressed the fact that s. 7(5) is merely a procedural section and does not destroy causes of action
E or invalidate claims, and could be waived. The choice lies with the defendant. If he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If no plea of limitation was raised in the defence, the
F plaintiff is entitled to assume that the defendant does not wish to rely upon a time-bar but prefers the court to adjudicate the issues raised in the dispute between the parties. He pointed out that in *Ketteman v. Hansel Properties* [1987] AC 189 at 219, the House of Lords expressed their disapproval for a defendant not pleading the
G defence of limitation early but raising it at the close of trial. The court in that case refused to allow the defendant to amend his pleadings to raise the defence of limitation at that stage because of its unfairness to the plaintiff.

H **[16]** He therefore urged this court to allow the plaintiffs' appeal with costs.

Decision

[17] The pleading point raised in this appeal is certainly of some
I importance. A plea of limitation raised at submissions stage after the court has gone through the whole process of full trial clearly no longer serves its purpose as a procedural bar when the case

can, if raised at an earlier date, be struck out based on a technical defence. By reason of the failure to plead the issue of limitation, the plaintiffs clearly have been lulled into a sense of security that the case would be met on the merits. If it was still open for a defendant to raise limitation at such a late stage, there would clearly have been a wastage of precious judicial time. The court notes that, in the circumstances of the present case, limitation was raised at a stage when the evidence at trial indicated 100 % liability on the part of the defendants. To permit the defendants to raise limitation, would effectively be giving the defendants an opportunity to renew the fight on an entirely different defence.

[18] On the case law referred to us, after careful examination of the cases of *Kuan Hip Peng* and *Lee Cheng Yee*, we have come to the conclusion that we are not bound to follow them for the following reasons.

[19] The case of *Kuan Hip Peng* can clearly be distinguished. It was not a case about the requirement of pleading of defence of limitation as the point was taken by way of a striking out application. The decision was delivered without reference to an express provision on pleading. Limitation was raised at a very early stage. The plaintiff in that case was not taken by surprise. The plaintiff had the opportunity to meet them. The issue on non-compliance of the rules relating to pleading was not an issue in such a situation.

[20] Had the defendant in this case taken a similar course of action and applied to strike out the statement of claim on the basis of a time-bar, only then would the decision in *Kuan Hip Peng* be a complete answer. We are therefore in agreement with counsel for the appellant that *Kuan Hip Peng*'s case is therefore not an authority on non-pleading of limitation.

[21] As for the decision of a court of co-ordinate jurisdiction, that of the Court of Appeal in *Lee Cheng Yee* which extended the principle in *Kuan Hip Peng* further to the pleading question, there was clearly no consideration of O. 14 r. 14(1) SCR and O. 18 r. 8(1) RHC which have statutory force. That decision in that respect was *per incuriam*. This court is not bound by the decisions of courts of co-ordinate jurisdiction which clearly is made *per incuriam*. Having arrived at the conclusions that we have arrived at, we consider that we are entitled and our duty to depart from it.

A **[22]** The omission in this case to plead limitation could have been inadvertent, it may have been deliberate. Whatever the real reason for the omission may be, the object of pleadings of not taking the opposite party by surprise as a matter of natural justice as provided by the rules must be observed. A defence by "ambush" B clearly should not and cannot be permitted to continue to form part of our procedural law when it results in an injustice to a litigant. A defendant who fails to plead a limitation defence, and allowed a case to proceed to be fought on the merits, is not to be permitted to fall back upon a plea of limitation as a second line C of defence at the conclusion of trial.

[23] For the reasons given above the appeal is according allowed with costs. Deposit to appellants on account of taxed costs.

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